(b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950."

(3) As regards the objection that the Sale Agreement was different from what the defendant had agreed to execute, it has to be noted that the Sale Agreement was executed three days after a draft was prepared during negotiations. The Sale Agreement was read and the defendant's signature was attested by his own solicitor and the defendant cannot now go back and say he did not understand the contents nor that he did not agree to the terms.

(4) As to the last objection that the agreement is not capable of being specifically enforced against the plaintiff I find there is no merit in this. The agreement expressly provides that the plaintiff shall give $1\frac{3}{4}$ houses to the defendant of every ten houses or $17\frac{1}{2}\%$ of the market value of ten houses. So the alternative can be specifically enforced and need not involve continuous supervision by the courts.

Here as I stated earlier the plaintiff has performed as much of the contract as it could before the vendor transfers the said land. The defendant has accepted even the sum of $400,000 without protest or argument and enjoyed the benefits of it. As was stated in the case of *Anglesey (Earl)* v. *Annesley*[1]

"If an agreement is part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a court of equity will decree specific performance of the remaining part of it."

It would therefore be unconscionable to accept his defence as a *bona fide* defence and have the case go to trial. It is just a sham defence to help the defendant avoid having to perform his part of the contract.

Under the circumstances and for reasons given above there will be judgment for the plaintiff in terms of the minutes annexed to the summons-in-chambers.

Application allowed.

Solicitors: *G.T. Rajan & Co.; Adam & Co.*

NG MOO YIN & ANOR. v. NG CHEE KONG & ANOR.

[O.C.J. (Arulanandom J.) September 24 & December 8, 1980; February 23, 1981 & April 27, 1981]

[Penang — Originating Motion No. 29 of 1980]

Practice and Procedure — Trust — Ex parte application for appointment as trustees — Order granted — No notice to other beneficiaries — Order set aside.

Estate and Trust — Trust — Appointment as trustees by ex parte application — No notice to other beneficiaries — Order set aside.

This was an application to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased). The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the said Estate.

Held, setting aside the Order: in spite of the fact that there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself, the applicants had a right to set aside the Order obtained *ex debito justitiae.*

ORIGINATING MOTION.

N.T. Vello for the applicants.

Goh Lim Eam for the respondents.

Arulanandom J.: This was an application by the applicants to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased).

The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the Estate of Ng Teik Thye (deceased) viz. Ng Kok Chan who died intestate on December 1, 1978.

Various allegations are made against the respondents in the affidavit of the applicants in support of the application. But these need not be considered here. The fact remains that in spite of the fact there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself the applicants have a right to set aside the Order obtained *ex debito justitiae.*

The court therefore set aside the Order dated June 1, 1979 in Originating Summons No. 164 of 1979 with costs.

Order accordingly.

Solicitors: *Chang & Vello; Goh Lim Eam & Co.*

HONG KEOW TEE & ANOR. v. ALKHARED & KHOO HOLDINGS SDN. BHD.

[O.C.J. (Arulanandom J.) April 21, 1980 & April 29, 1981]

[Penang — Originating Motion No. 6 of 1980]

Land Law — Caveat — Removal of Caveat — Effect of — National Land Code, s. 326(2).

On the strength of an agreement dated March 17, 1978 for the applicants to provide the pieces of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to at the first caveat). On October 18, 1979, the applicants caused a notice in Form 190 of the National Land Code to be served on the respondents for the removal of the first caveat. The respondents promptly applied by an *ex parte* Originating Summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code. However, the respondents had failed to serve the relevant order on the Registrar, as required by the provisions of section 326(2). The caveat was accordingly removed after the period allowed by the notice in Form 19C. When the respondents realized that this had happened they immediately caused a further caveat, No. 2310/79 (the subject matter of this application), to be lodged against the said pieces of land.

The question before the court was whether the respondents were entitled to lodge the second caveat (No. 2310/79) when the first had been removed.

Held, allowing the application: (1) once a caveat is removed, the removal is conclusive and it is extinguished forever;

(2) the caveat (No. 2310/79) should be removed forthwith.

Cases referred to:-

(1) *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128, 129 & 130.

(2) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172, 174.

ORIGINATING MOTION.

R. Manecksha for the applicants.

N. Chandran for the respondents.

Arulanandom J.: This was an application by Motion by the applicants for an Order that Caveat No. 2310/79 Jilid 35, Folio 190 lodged by the respondents Alkhared & Khoo Holdings Sdn. Bhd. in respect of Lots Nos. 1269 and 1271, Mukim 13, Daerah Timor Laut, Pulau Pinang, be removed.

The issue before the court was very simple. On the strength of an agreement dated March 17, 1978 for the applicants to provide the pieces of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to as the first caveat). On October 18, 1979, the applicants caused a notice in Form 19C of the National Land Code to be served on the respondents for removal of the first caveat. The respondents promptly applied by an *ex parte* Originating Summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code.

Section 326(2) of the National Land Code reads as follows:—

"(2) The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended."

By the provisions of this section it is incumbent on any person on whose application the caveat is extended to serve the order of court on the Registrar of Titles, who on being duly served is enjoined not to remove the said caveat.

In this instance, however, for reasons best known to themselves the respondents failed to serve the relevant order on the Registrar and the caveat was accordingly removed after the period allowed by the notice in Form 19C.

When the respondents realised that this had happened they immediately caused a further caveat, No. 2310/79 Jilid 35, Folio 190 (the subject-matter of this application), to be lodged against the said pieces of land.

The question before the court was simply this — whether the respondents were entitled to lodge this second caveat when the first had been removed.

The question has been considered by these courts previously and the answer has been that once a caveat is removed, the removal is conclusive and it is extinguished forever.

In the first case Syed Agil Barakbah J. in *Damodaran* v. *Vasudeva*[1] states as follows: —

"In the present case, the respondent on receipt of notice of the intention for the intended removal of the caveat from the Registrar on September 7, 1973, should have applied to the court for its extension under sub-section (2). Instead of doing so he applied for and obtained another caveat when the first caveat was still in existence. The result is that in the absence of such application for extension under sub-section (2) the first caveat according to sub-section (1)(b) must be removed by the Registrar on October 7, 1973, i.e. on the expiry of one month as specified in the notice. In other words, on that date the first caveat would no more be in existence.

Now, in answering the main question one has to look at sub-section (2) of section 326. The object of the sub-section is dealt with in precise detail by Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy* v. *Hamzah* ([1966] 2 M.L.J. 175 at p. 176) which I accept with respect. It is clear that the word 'extend' appearing in the sub-section has to be construed according to 'its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than re-vest an expired right'. In other words, it points to the existence of a caveat which it allows to be extended by order of court from time to time. It does not speak of a re-creation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive, renew or continue a caveat after its lapse. The extinction is final and irrevocable. (*Per* Ong J. (as he then was) in *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* ([1959] M.L.J. 257). If the sub-section were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (*Per* Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy's* case, *supra*). Further section 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

The provisions of section 329(2) requires scrutiny. It disallows the Registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the court has ordered the removal of the former or has turned down an application for extension of time. The sub-section must be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator."

This construction of the provisions of the National Land Code re: Caveats was followed and applied by Syed Othman J. (as he then was) in the case of *Arul Chandran* v. *Tara Rajaratnam*[2] where, at page 174, he states as follows:—

"In dealing with this point, I need only advert to the judgment of Syed Agil Barakbah J. in *Damodaran* v. *Vasudeva* ([1974] 1 M.L.J. 128, 129) where at page 129 he discussed several authorities. He referred to *K.I. Muhiuddeen Rawther* v. *K.E.P. Abdul Kassim* ([1959] M.L.J. 257) where Ong J. (as he then was) said that the extinction of a caveat is final and irrevocable. It seems to be established law that the court has no power to remove, renew or extend a caveat after its lapse. I should add if it is based on the same claim. Under section 326(2) of the National Land Code the power to extend the life of the caveat lies with the court. The respondent ignored the Collector's notice to remove the caveat. She did not apply to the court for extension. Applying the above principle, the removal by the Collector has the effect of extinguishing the caveat. In my view, the action of the respondent in lodging another caveat, based on the same claim after the Collector had removed the first caveat and without seeking the court's order, was tantamount not only to spurning the Collector's act done according to law, but also to

usurping the powers of the court. Considering this act of the respondent and then her non-disclosure to the court that the first caveat had been removed, I do not think she has any ground, equitable or legal, to maintain the caveat. Further, the land, by reason of her own act in having transferred it, has lost its original user, as it is being developed into a housing estate. The applicant must have expended substantial sums for the development. Regard must be had to this and to public interest as well. But in spite of all this, I would not say that the respondent is without remedy. If she could establish her claim, damages should be appropriate remedy in the circumstances of the case."

I was full in agreement with the interpretation of the law by my learned brothers and had no hesitation in following it. I therefore ordered that the application be allowed with costs and the said caveat be removed forthwith.

Application allowed.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*

IN RE THE ESTATE OF TUNKU MOHAMED JEWA IBNI ALMARHUM SULTAN ABDUL HAMID, DECEASED TUNKU ISMAIL BIN TUNKU MOHAMED JEWA & ANOR. v. TUNKU BAHAROM BIN TUNKU MOHAMED JEWA & ORS.

[O.C.J. (Syed Agil Barakbah J.) September 24, 1981]

[Alor Star — Originating Summons No. 125 of 1981]

Probate and Administration — Application for sale of land belonging to estate — Conditional contract for sale — Existence of better offers after conditional contract — Sale by tender.

In this case the deceased left a number of landed properties. The plaintiffs, the administrators of the estate, applied for leave to sell the properties. A valuation report was obtained in respect of the properties. The plaintiffs applied for leave to sell a piece of land comprised in SPK No. 20740, Lot 2414, Kota Setar for the sum of $830,000 in accordance with a conditional contract made with intending purchasers. This agreed price exceeded the valuation price by $220,000.00. The plaintiffs also applied for leave to sell the other properties by tender based on the minimum prices according to the valuation report. One of the beneficiaries of the estate, Tunku Maryam, objected to the sale under the conditional contract, as she showed there were better offers for the land. She however consented to the sale of the other lands.

Held: (1) as the parties had consented, an order would be made for the sale of all the other properties with the exception of the land in dispute by way of tender under Order 31 rule 2 of the Rules of the High Court, 1980;

(2) the plaintiffs were not bound by the agreement, executed with the purchasers unless leave was granted by the court. In this case as there were better offers for the land the conditional contract should not be approved, but the land should be sold by way of tender in order to obtain the best price possible.

Cases referred to:-

(1) *Che Ah and Che Yang Kelsom* v. *Che Ahmad* [1941] M.L.J. 126.

(2) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50.

(3) *Ng Lit Cheng* v. *Felixia Varnakulasinghe & Anor.* [1977] 2 M.L.J. 249.

(4) *Buttle & Ors.* v. *Saunders & Anor.* [1950] 2 All E.R. 193.

(5) *In re Thomas, Bartley* v. *Thomas* [1911] W.N. 143.

ORIGINATING SUMMONS.

Ng Yoke Mui for the plaintiffs.

S. Visvanathan for the objector.

G. Sutherson for the purchasers.

Syed Agil Barakbah J.: This is an originating summons filed by the two plaintiffs in their capacity as the administrators of the estate above-named. They are seeking leave of this court for:

(i) liberty to sell and transfer all those pieces of land belonging to the estate as described in section 1 of Schedule 1 annexed to the affidavit for the minimum prices according to the Valuation Report by qualified surveyors as stated in section 2 of the said Schedule by way of private treaty, tender or auction;

(ii) that the profits of the sale of the aforesaid properties be utilised to discharge all liabilities of the estate and the balance thereof be distributed amongst all the beneficiaries as named in Schedule 2 thereof in their appropriate shares according to the Muslim Law of distribution; and

(iii) that the costs of the summons be paid out of the assets of the estate.

All the beneficiaries have filed their respective letters of consent with the exception of Beneficiary No. 14 i.e. Tunku Maryam binte Y.T.M. Tunku Mohd. Jewa Haji (hereinafter called the "objector") who objected to the application in particular to the proposed sale of land comprised in SPK No. 20740, Lot 2414, Mukim of Kota Setar (hereinafter called "the land in dispute"). Her main ground was that the land in dispute is worth considerably more than $590,000 as valued in the Valuation Report and that the other properties should not also be sold for the minimum reserve prices. At the first hearing in my chambers on September 5, 1981 both plaintiffs were represented by Miss Ng Yoke Mui, the objector was represented by Mr. Visvanathan and Mr. Suthersan appeared on watching brief on behalf of the purchasers.

The facts and surrounding circumstances of the case are that the deceased died leaving 19 beneficiaries viz. his surviving widow, sons and daughters who are entitled to his estate under the Muslim law according to their respective shares as stated by the letter of the Kadi Besar Negeri Kedah. (Ex. J, attached to plaintiff's affidavit dated July 19, 1981, Encl. 6). On October 25, 1980 the widow renounced all her shares, rights and interests in the estate of the deceased in favour of the objector (Ex. B attached to Encl. 1 of the plaintiff's affidavit dated March 7, 1981). The latter is therefore entitled to the largest share among all the beneficiaries.

The deceased died leaving properties comprising mainly of 13 pieces of land, cash deposit in banks and one motorcar as assets. The liabilities comprise of funeral expenses and of gifts-inter-vivos of some lands made in his lifetime. These are shown in Ex. C attached to Encl. 1 issued by the Pemungut Hasil Pesaka Tanah Melayu. The estate duty has been assessed at $240,053.15 of which the sum of $188,174.80 has been paid towards partial discharge, leaving a balance of $90,503.16 still owing (Ex. D attached to Encl. 1). The intention of the plaintiffs in making the present application to sell the properties is with a view to settling that balance and all other liabilities incurred on behalf of the estate including the annual